IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-329

CORDECO DEVELOPMENT CORPORATION,
Petitioner,

v.

ANTONIO SANTIAGO VÁZQUEZ, INES ACEVEDO, as Sub-Secretary of the Department of Natural Resources of the Commonwealth of Puerto Rico, and Individually; LENON MERCADO MERCADO, as an Officer of the Department of Natural Resources, and Individually; and PEDRO NEGRÓN RAMOS, individually and in his capacity as the Secretary of the Department of Natural Resources,
Respondents.

On Appeal from a Judgment of the United States District Court for the District of Puerto Rico

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

ROBERTO ARMSTRONG, JR.
Acting Solicitor General

RONALDO RODRIGUEZ OSSORIO
Assistant Solicitor General

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents Antonio Santiago Vázquez and Pedro Negrón Ramos pray that the Writ of Certiorari requested in the above-captioned case be denied.

COUNTER-STATEMENT OF FACTS

The relevant facts of this case have been set forth in detail in the Opinions of the United States District Court for the District of Puerto Rico, Civil No. 803-71[1] and of the United States Court of Appeals for the First Circuit, No. 75-1424,[2] and in order to avoid repetition we adopt them herein.

Nevertheless, the Statement of the Case as presented in the Petition for Writ of Certiorari is at times imprecise, incomplete, or both, for which reason we wish to clarify some points which were highly relevant in the resolution of the case below.

In 1949, the Abreu family owned an undivided piece of land in Isabela, Puerto Rico, which consisted of 179 "cuerdas".[3] According to the description of the property, as it appears from the deed and a certification of the Registry of Property—both presented as evidence at trial—its northern boundary was the "maritime zone". In 1949, the Abreu family decided to divide said tract of land among the heirs and, for that purpose engaged the services of a notary public, who prepared the corresponding deed of segregation,[4] and the property was divided into six parcels of land totalling approximately 125 "cuerdas"; that is, less than the total acreage of the original piece of land. In said deed, although the notary public described the newly created six separate parcels of land, he did not include a de-

[1] Appendix "B" of the Petition.

[2] Appendix "A" of the Petition.

[3] A "cuerda" is a measure of land consisting of 43,290 square feet, which is less than 1% smaller than an acre.

[4] It was admitted as evidence at the trial.

scription of the remnant, which consisted of the difference between the 179 "cuerdas" and the total of the six parcels of land with a total of 125 "cuerdas". Nevertheless, he stated in the deed that the difference in acreage was "in the dunes of the maritime zone". Contrary to the evidence submitted below, petitioners state that "In 1949, a local attorney divided the entire property among six (6) Abreu heirs, the value of six (6) equaling the value of the previously undivided whole".

When describing the six parcels of land, the North boundary of each parcel was changed from that of the original tract of land. That is, instead of stating that the North boundary was "the maritime zone" it was stated that the North boundary was "the dunes of the maritime zone".

In 1956, one of the Abreu heirs sold her parcel of land to Carlos D. Cordero for $6,400.00; the parcel was described as having 32 "cuerdas", and was inscribed for that amount in the Registry of Property.

In 1969, when sand became very valuable, the sons of Carlos D. Cordero organized a Panamanian Corporation by the name of Cordeco Development Corporation—the petitioner herein—which, through a public deed,[5] bought the parcel from Cordero. In said deed, the Corporation was represented by its president, Charles A. Cordero, the son of Carlos D. Cordero; the parcel of land was described the same way that it had been described in the deed by which it was created. Said deed contained an unilateral and gratuitous statement to the effect that even though the de-

[5] Plaintiff's Exhibit 7 before the U.S. District Court.

scription of the parcel stated that it consisted of about 32 "cuerdas", it really consisted of sixty-two; in other words, the farm grew suddenly and spontaneously to almost twice its size, according to petitioner's deed. The Registrar of Property rejected this clearly illegal contention and, pursuant to Puerto Rican law, registered only the original 32 "cuerdas".

The new owners, petitioners herein, did not exercise any of the actions prescribed by Puerto Rican law to inscribe this alleged excess in the area of the parcel. They merely, on the day after the signing of the deed, filed a petition with the Department of Public Works of Puerto Rico to extract sand. At that time, defendant Antonio Santiago Vázquez was the Secretary of said Department, one of the largest in the government of the Commonwealth of Puerto Rico; as such, he had the statutory right to act on such permits. Codefendant Zenón Mercado was an engineer in that Department, and he was responsible for analyzing petitions from a technical point of view, and recommending action. Codefendant Inéz Acevedo de Campos was the legal advisor to the Department, and had to evaluate petitions from the legal standpoint. After several meetings with Charles A. Cordero, Mrs. Acevedo de Campos stated that the permits could not be issued since Cordeco did not have legal title to the land from which the sand was to be extracted; she took no definite action to solve this matter. No evidence was presented to establish that Mr. Santiago Vázquez, the Secretary of a Department with over three thousand employees, had any knowledge of this.

The first court attempt to clarify Cordeco's title to the land was a lawsuit filed by members of the Abreu

family against petitioner.[6] On March 18, 1975 the District Court dismissed the complaint and held that Cordeco was the owner of the tract of land. It should be noted that as of January 1972, Mr. Santiago Vázquez was no longer Secretary of the Department of Public Works.

On December, 1973, Mr. Cruz A. Matos, the then Secretary of the Department of Natural Resources--which now had the responsibility for issuing sand extraction permits—issued petitioner a permit to extract sand. However, petitioner alleged that this permit excluded the area of land containing most of the sand dunes; this permit had been granted according to the recommendations of Acevedo and Mercado.

On August, 1974, codefendant Pedro Negrón Ramos was appointed Secretary of the Department of Natural Resources.[7] At this time, codefendants Mercado and Acevedo had responsibility for the sand extraction permits, from a technical and legal standpoint respectively. Mr. Negrón Ramos took no action on the petition for a sand extraction permit because according to the Department's files, a permit had already been issued and was still in force and there was no application for its amendment. Furthermore, a case was pending before the U.S. District Court, in which he was included as a defendant after he took office.

The evidence against Dr. Santiago Vázquez can be summarized as follows: he was Secretary of the Department of Public Works from 1969 to 1973 and was

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[6] *Bravo Abreu* v. *Cordeco Development Corp.*, 954-70, U.S.D.C.-P.R.

[7] The case was filed originally on October, 1971.

empowered to act upon requests for sand extraction permits. However, defendant Acevedo was responsible for the analysis of such petitions from a legal perspective and defendant Mercado was responsible for technical analysis. The U.S. Court of Appeals found that:

> "There is ample evidence to show that for all essential purposes Acevedo and Mercado were the parties in position to control the granting or denial of permits and that, with respect to plaintiff's application, all actions taken were in response to the recommendations of Acevedo and Mercado."

The evidence tendered against Mr. Negrón Ramos can be summarized in the words of the U.S. Court of Appeals:

> "When defendant Negrón Ramos became Secretary of the Department of Natural Resources in August, 1974 [the] earlier permit was still in force and Cordeco had not filed a new petition for sand extraction; accordingly Negrón Ramos did not have occasion to grant or deny plaintiff's permit application."

After the case was heard, the advisory jury empanelled by the District Court found that Messrs. Santiago Vázquez and Negrón Ramos were acting within the limits of their lawful authority or discretion. The U.S. District Court agreed with this finding of the advisory jury in its opinion, as did the U.S. Court of Appeals. It was ruled that they enjoy qualified immunity as a matter of law and are not subject to liability for their actions with respect to Cordeco's sand extraction permit.

REASONS FOR DENYING THE WRIT

I. The Decision Below Granting Immunity to Codefendants Antonio Santiago Vaquez and Pedro Negron Ramos Was Correct.

Petitioner's contention that the courts below erred in granting immunity to Messrs. Santiago Vázquez and Negrón Ramos lacks merit for two basic reasons: (a) lack of evidence and (b) the doctrine of qualified immunity.

It should be made clear that the "acts" to which petitioner refers are that codefendants herein did not solve the petition for sand extraction permits within the period of sixty days after they were filed. As we have seen, Mr. Negrón Ramos took no action on the sand extraction permit because according to the files of the Department of Natural Resources a sand extraction permit had been issued to Cordeco on December, 1973, by his predecessor Cruz A. Matos, and no further applications for a permit, or requests for the amendment of the existing one, had been submitted; in these circumstances, there was nothing before his consideration. Petitioner attempted to establish before the District Court that Mr. Negrón acted in bad faith because he did not act after he had been included as a defendant in the case at bar; this contention was rejected by the Court. It would be against the better interest of good government administration to have done so while there was a controversy pending before a court and while there was no administrative action pending. As to Mr. Santiago Vázquez, from a memorandum [8] dated November 3, 1971 it appears that, rely-

[8] Plaintiff's Exhibit 24.

ing on the advice of his legal counsel, codefendant Acevedo de Campos, he directed her to prepare a "reasoned order denying the permit . . ."

The District Court concluded from the evidence submitted that the action—or inaction—of Messrs. Santiago Vázquez and Negrón Ramos with respect to Cordeco's application for a permit to extract sand was in response to the recommendations of the other codefendants, who were the parties in a position to control the granting or the denial of such permits. Therefore, the District Court agreed with the advisory jury that Messrs. Santiago Vázquez and Negrón Ramos were acting within the limits of their lawful authority or discretion. As such, the District Court concluded and the Court of Appeals affirmed, they enjoy qualified immunity and are not subject to liability for their role in failing to act on Cordeco's application. In concluding so, the courts below relied primarily on this Court's decisions in the cases of *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), and *Wood* v. *Strickland,* 420 U.S. 308 (1975).

Public officials enjoy an absolute or qualified immunity, depending upon the nature of the office and the scope and discretion of responsibilities appertaining thereto. In *Scheuer* v. *Rhodes, supra,* this Court held that:

> "It is the existence of reasonable grounds for the belief formed at the time and in light of all circumstances, coupled with good faith belief that affords the basis for qualified immunity."

This official immunity, as stated in said case by this Court, rests on two mutually dependent rationales:

> "(1) The injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion, and;
>
> (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good."

Acts which are discretionary in nature when performed by a public official do clothe him with a governmental immunity of a limited nature. *Dewell* v. *Lawson,* 489 F.2d 877 (1974). The broadness of, and the nature of the functions and duties with which a public official is charged must be considered in determining whether an official privilege from liability applies, and consideration must be given to the proof supporting the defense of official privilege, i.e., lack of malice, intent, wilfulness, or bad faith, or conversely, a showing of good and proper cause for the act complained of. The determination of reasonable grounds and good faith which affords immunity to members of the executive branch must be based on the evidence presented by the parties; in the case at bar, the evidence clearly indicates that the conduct of Messrs. Santiago Vázquez and Negrón Ramos falls within this Court's immunity doctrine, and it was so recognized by the advisory jury when it concluded that they were acting within the limits of their lawful authority or discretion, and by the courts below in rejecting any claims against them.

It is inconceivable that, on the basis of the evidence introduced at the trial, as the courts below have summarized it, and considering this Court's doctrine, respondents herein could be held responsible for damages to petitioner.[9] Respondents herein acted as heads of large government departments and as such, in order to properly fulfill their duties, had to reach daily a large number of decisions of a varied and important nature; in order to be able to act at all they had to follow the usual procedure in these cases, that is, to delegate on subordinates part of their functions, particularly in those cases that required a complex and extensive amount of technical factual data and on which careful legal evaluations had to be made. For these reasons, respondents herein had to rely on the technical advice of an engineer who had made a field study of the land—in this case codefendant Mercado. Also, since neither is an attorney, they had to rely on the advice of the head of their legal section—in this case codefendant Acevedo de Campos. In this particular occasion the legal advisor informed respondents herein that Cordeco did not have a valid title to the dunes from where it had requested to extract sand, and that said dunes were probably the property of the Commonwealth of Puerto Rico; in these circumstances it would have been highly irresponsible—not to say illegal—for them to issue the permit requested by Cordeco.

Only through this reliance on the advice of specialized subordinates can high government officers adequately discharge their numerous responsibilities. As this

[9] See: *Franklin* v. *Meredith*, 386 F. 2d 958 (1967); *Dewell* v. *Lawson*, 489 F. 2d 877 (1974); *Klein* v. *New Castle Co.*, 370 F. Supp. 85 (1974); *O'Brien* v. *Galloway*, 362 F. Supp. 901 (1973).

Court stated in *Robertson* v. *Sichel*, 127 U.S. 507, 515 (1888):

> "Competent persons could not be found to fill positions of the kind if they know that they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person."

This is also the reason why the courts have asserted that the wider the range and scope of discretion and responsibility of the public official, and the higher the office, the wider and more encompassing his immunity from liability will be. In other words, as the scope of discretion widens, the officer's decision becomes subject to less rigorous review. *Barr* v. *Matteo*, 360 U.S. 564, 572; *Jones* v. *Manson*, 17 Cr. L. 2153, 2154 (1975).

Whether Messrs. Santiago Vázquez and Negrón Ramos acted within the bounds of their lawful discretion and authority, and thus enjoy qualified immunity is a question of fact that was solved in their favor by the advisory jury in their verdict. The District Court held that:

> "The court finds from the evidence that the action, or lack of action taken by the defendants Santiago Vázquez and Negrón Ramos with respect to plaintiff's application for a permit to extract sand were in response to the recommendations of the other defendants who were the parties in the position to control the granting or denial of the permit."

The Court of Appeals found that ". . . the evidence supports the conclusion that defendants Vázquez and

Negrón Ramos acted within the bounds of their legal authority and discretion . . ."

Petitioner's thrust in asking this Court's review relies solely upon and analysis of the particular facts involved, and in essence consists of a request that this Court review evidence already ruled upon by an advisory jury, a District Court and a Court of Appeals. In situations such as this, this Court has held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271, 275 and cases cited; *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635. The purpose of a Writ of Certiorari is not merely to give the defeated party in the Circuit Court of Appeals another hearing. *Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

There is no conflict between the decision rendered in the case at bar and any other decision by a federal court; on the contrary, it closely follows this Court's doctrine as to qualified immunity. Nor is there a serious legal question involved since this case deals merely with determining whether under a highly specific and well-defined set of facts, certain government officers would be liable in damages to a certain corporation; this issue was solved pursuant to this Court's doctrine and petitioner fails to present a substantial legal issue which merits this Court's exercise of its discretionary jurisdiction.

Petitioner's allegations fail to go beyond a mere difference of opinion as to whether respondents' acts

were within the bounds of their lawful authority and discretion; it fails to present a constitutional or substantial legal issue. This does not constitute the jurisdictional basis on which certiorari may be granted, for which reason the writ should be denied.

II. This Is Not a Proper Case for the Creation of Evidentiary Standards.

Petitioner's second alleged error falls within the same arguments as above inasmuch as it also fails to go beyond the jury's evaluation of the evidence submitted. Since the jury in this case was advisory, and the District Court reached its own findings of facts independently, this is not a proper case in which to deal with charges to the jury. Furthermore, the charges to the advisory jury were discussed and agreed to by all parties before they were given to it. Finally, this question was never raised before the District Court or the Court of Appeals, and should not be considered for the first time on appeal to this court.

III. Respondent's Action Did Not Cause Petitioner's Damages, and There Was No Proof of Petitioner Having Suffered Any Damages.

The facts upon which petitioner pretends to fundament his claim for damages can be summarized as follows: He buys a farm for $6,400.00; through the years it increases in value to $1,600,000.00 because of the 800,000 cubic meters of sand therein are now worth $2.00 a cubic meter; he has suffered $500,000 in damages because of a delay in granting a permit to extract sand which is still in his land, and can be extracted since a permit to do so was issued. This contention is ludicrous and was rejected as such by both courts below.

The purpose of damages is to place plaintiff in the same position, so far as money can do it, as he would have been had there been no injury or breach of duty, that is, to compensate him for injury actually sustained. *Lee* v. *Southern Home Sites Corp.*, 429 F.2d 290 (1970). In order for there to exist liability for monetary damages under the Civil Rights Act there must be a showing that the defendant personally and directly participated in the acts that were violative of plaintiff's rights under federal law. *Jennings* v. *Davis,* 339 F. Supp. 919 (D.C. Mo.), affirmed 476 F.2d 1271 (1972). Damages must be proven; they may not be speculative and plaintiff must not be made more than whole. *Newton* v. *Rockwood & Co.*, 261 F. Supp. 485 (D.C. Mass.), affirmed 378 F.2d 315 (1966). Generally, in property damage cases the tort or contract liability of a party is limited to the difference in value between what the plaintiff's property is worth and what it would be worth but for the fault of the defendant. *Gleason* v. *Title Guarantee Co.*, 300 F.2d 813, 815 (1962); *Albrecht* v. *Herald Co.*, 452 F.2d 124 (1971). In other words, the basic goal of the court is compensation—that is, to award such an amount of money as will restore the injured party to the same property status which he occupied immediately prior to the injury. See *Albemarle Paper Co.* v. *Moody*, 422 U.S.405 (1975).

When monetary damages are sought under the Civil Rights Act, the doctrine of *respondent superior* does not suffice, and a showing of some personal responsibility of defendant is required. *Mukmuk* v. *Commissioner of Department of Correctional Services*, 369 F. Supp. 245 (D.C.N.Y. 1974).

The question of damages was clearly solved by the U.S. Court of Appeals in the opinion rendered in the case at bar in the following terms:

> "We next examine the issues of damages. The advisory jury awarded plaintiff $500,000 compensatory damages for losses sustained from the withholding of the permit to excavate sand. The court disregarded this finding and awarded only nominal damages in the sum of one dollar to the corporation on the ground that Cordeco had not actually suffered an economic loss. The court pointed to the uncontradicted evidence presented at trial indicating that in 1970, at the time of plaintiff's application, sand was selling in Puerto Rico for $1.00 per cubic meter and that by 1975 the price had risen to $2.00 per cubic meter. The court held that 'the sharp increase in [the] value [of sand] between 1970 and 1975 belies the conclusion that plaintiff was completely deprived of an extremely valuable asset,'' and that allowing the jury award 'would entail double recovery in this case since the sand remains on the land . . .'
>
> Plaintiff claims it is nevertheless entitled to a damage recovery because there has been a decrease in major construction and substantial decline in marketability of sand which makes it much more difficult to sell the commodity in 1974 and 1975 than had been earlier. The district court concluded, however, that despite the greater difficulty of selling sand, plaintiff had not suffered any loss because of the increased value of the sand in 1975. *The court also ruled that even if plaintiff had suffered an actual present loss, 'the amount has not been proven.' After careful examination of the entire record we are compelled to agree.*
>
> Plaintiff's theory of damages in this case is essentially analogous to that based on a claim of tortious interference with business relations. In

the instant situation such a theory would require evidence in the nature of loss of profits from sales of the sand, which of course would be offset by the value of the remaining asset. Here, inasmuch as evidence indicates a doubling in the selling price of sand over the relevant time period, see n.7 supra, plaintiff, to prove the fact of damage, must show that the decline in marketability of the sand decreased its 'real' value as an asset below the ostensible selling price; otherwise the value of the remaining sand would more than compensate for plaintiff's alleged lost profits. A party's financial loss is the ultimate measure of his damage, *PSG Co.* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 417 F.2d 659, 663 (9th Cir. 1969, cert. denied, 397 U.S. 918 (1970), and the purpose of a damage award is to compensate the injured party for loss resulting from the conduct of the wrongdoer, 'not to penalize the wrongdoer or to allow plaintiff to recover a windfall.' *Farmers and Banker Life Insurance Co.* v. *St. Regis Paper Co.*, 456 F.2d 347, 351 (5th Cir. 1972). See *Big Rock Mountain Corp.* v. *Stearns-Roger Corp.*, 388 F.2d 165, 169 (8th Cir. 1968). However, *plaintiff has failed to make the requisite showing.*

Although it introduced evidence to the effect that the marketability of sand had decreased, this evidence was of a very general nature, see n.9 supra, and provided no clear basis for calculating the extent to which the market decline had reduced the present value of the remaining sand as reflected in the current selling price. *In sum, we do not find in the record a sufficient basis for drawing a reasoned conclusion that the deprivation of profits overbalanced the substantial increment in value of the remaining sand.* And with respect to the amount of damages, while a plaintiff need not demonstrate the amount of damage with mathematical precision, see *Burns Bros. Plumbers, Inc.* v. *Groves Ventures Co.*, 412 F.2d 202, 209 (6th Cir. 1969); *DeVries* v. *Starr*, 393 F.2d 9, 18 (10th Cir. 1968) it must provide sufficient evidence to take the amount of damages out of the realm of speculation and conjecture. *Locklin* v. *Day-Glo Color Corp.* 429 F.2d 873, 879 (7th Cir. 1970), cert. denied 400 U.S. 1020 (1971); see *Tri-State Produce Co.* v. *Chicago, B. & Q. R. Co.*, 104 F. Supp. 452, 463 (N.D. Iowa 1952); cf. *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264 (1946). As the district court properly found, *plaintiff has here failed to meet that burden.*" (Footnotes omitted) (Our emphasis)

In essence, we are dealing with a two fold conclusion of both courts below: (a) respondents herein were not liable for damages, and (b) there was no showing of Cordeco Development Co. having suffered any damages.

Again, we are dealing, as in the earlier argument, with the analysis of highly specific facts, in this case the evaluation by the inferior court of damages. From all the evidence tendered, the courts below found that the evidence submitted showed that petitioner's land had increased in value enormously, and had suffered no damages. Petitioner's only argument, i.e., that there had been a decrease in the marketability of sand, was not supported by specific evidence, and found to be speculative.

In conclusion, petitioner's contention is merely an attempt that this Court reappraise the conclusions of the District Court and the Court of Appeals based on a highly specific set of facts, as to the amount of damages—if any—suffered by petitioner. This, considering all circumstances, is clearly not a proper matter for review by this Court.

IV. Attorney's Fees

Since the reversal alluded to on petitioner's reasons number IV for granting the writ refers to codefendants Acevedo de Campos and Mercado, and not to respondents herein, we shall not discuss them. Attorney's fees have not been imposed on respondents herein at any time. Nevertheless, this is also a question of fact that has been solved, and amply fundamented, by the Court of Appeals, and is not a proper question for this Court to exercise its discretionary jurisdiction. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 420 U.S. 240; *Committee on Civil Rights of Friends* v. *Romney*, 518 F.2d 71 (1st Cir. 1975); *Victor Rivera Morales* v. *Celeste Benítez de Rexach, et al.*, No. 75-1265 (1st Cir., September 14, 1976).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERTO ARMSTRONG, JR.
Acting Solicitor General
of Puerto Rico

RONALDO RODRIGUEZ OSSORIO
Assistant Solicitor General
of Puerto Rico
Department of Justice
San Juan, Puerto Rico